UNIVERSITI MALAYA

INAUGURAL LECTURE

# DAMAGES FOR PERSONAL INJURIES AND CAUSING DEATH: A CRITICAL SURVEY

15th March 2004



by:

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*Faculty of Law,*
*University of Malaya*

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*Syarahan Perdana ini diadakan sebagai pengiktirafan jawatan profesor di Universiti Malaya*

PROFESSOR DATO' P BALAN

Faculty of Law

# CURRICULUM VITAE

## PROFESSOR DATO' P. BALAN

Dato' P Balan was born in Teluk Anson (now Teluk Intan), Perak and received his primary and secondary education at the Anglo-Chinese School, Teluk Intan. After completing his Cambridge Higher School Certificate he enrolled himself for the LL.B degree of the University of London as an external student. He obtained his LL.B and LL.M degrees from that University. Subsequently he passed the Bar Finals Examination and was admitted as a Barrister at Law by Lincoln's Inn. In 1988, he was admitted to the Malaysian Bar as an Advocate and Solicitor of the High Court in Malaya.

Dato' P. Balan's career with the University of Malaya began on 31st January 1975 when he joined the Faculty of Law as an Assistant Lecturer. Since then he has continued to serve the University of Malaya. He has been involved in the teaching of every intake of law students beginning with the first intake that graduated in 1975.

Dato' P. Balan was promoted to Associate Professor in 1982 and to the post of Professor in 1992. Between December 1988 and March 1990 he served as the Dean of Faculty of Law. In December 1983 the Legal Profession Qualifying Board appointed him as the first Director of the CLP programme in Malaysia. He served as the Director of the CLP programme from December 1983 to December 1986 and again from November 1989 to September 1993. He has also served as a Board Member of the National Accreditation Board of Malaysia and as external Examiner and Assessor for local as well as oversea universities. In 2000 he was conferred the title of Dato' Paduka Mahkota Perak by his Royal Highness, the Sultan of Perak, Sultan Azlan Shah.

# DAMAGES FOR PERSONAL INJURIES AND CAUSING DEATH: A CRITICAL SURVEY

## Introduction

Malaysian law on damages for personal injuries and causing death is a dynamic subject, judging from the number of reported judgments each year. In the last twenty years the law on this subject has witnessed radical changes. In this lecture I propose, with your kind indulgence, to undertake a critical survey of some parts of the subject and to put forward suggestions for its reform. It will be my thesis that a thorough study of the subject with a view to reform of the law is long overdue.

Malaysian law on this subject has its genesis in the English Common Law. However, Malaysian law on this subject has its own peculiar features. Some of these are the result of judicial activity and some the result of statutory intervention, in particular the Civil Law (Amendment) Act 1984, which came into force on 1st October 1984. The 1984 Amendment Act made sweeping changes to the law by removing or altering many Common Law principles which benefited injured persons or the dependants of deceased persons. Most of these novel provisions encroached upon areas which were traditionally the domain of the courts.

## Not possible to deal with all areas needing reform

At the outset I must state that time constraints do not allow me to deal with all areas of the law where, in my opinion, change and reform is necessary. One area which I am compelled to omit is the perenial problem encountered in the area of special damages, namely, as to whether an injured person may claim the cost of treatment in a private hospital when the same treatment could have been obtained at a much cheaper cost in a Government hospital. Differing judicial decisions on the subject and the absence of clear principles from a superior court have caused some uncertainty in this area of the law. There is a need for a certain degree of predictability to encourage settlement of claims.

This is one area where the uncertainty that exists today may only be resolved by a clear decision of a superior court or by a clear statutory provision.

## First part of this lecture is on personal injuries

The first part of my lecture this afternoon is on damages for personal injuries. In Malaysia today general damages for personal injuries are traditionally assessed under four heads, where the heads are applicable. The four heads are (i) pain and suffering and loss of amenity (ii) loss of future earnings (iii) loss of earning capacity and (iv) future care expenses. In my opinion, the head that needs critical examination and reform is the head loss of future earnings. Significant and far-reaching changes were made to the law which governed the mode of assessment of damages for loss of future earnings in 1984 by the Civil Law (Amendment) Act 1984 and these must now be reconsidered as to whether they meet the aspirations of a "caring society".

## Injured persons who had attained the age of fifty-five years and above

The first major change effected by the 1984 Amendment Act involved injured persons who had attained the age of fifty-five years. The 1984 Amendment Act provided, by adding a new section 28A (2)(c)(i) to the Civil Law Act 1956, that no damages for loss of future earnings shall be awarded to a plaintiff who had already attained fifty-five years of age at the time of the injury. Previously it was customary (but not a strict rule) for the courts to take fifty-five as the retiring age and to assume that the plaintiff's earnings would cease at that age. But where there was evidence that the injured person would have worked beyond the normal retiring age of fifty-five years, it was open for the court to take this factor into consideration when computing the multiplier for assessment of loss of future earnings. The court could award damages under this head to a plaintiff of age fifty-five years or above if, at the date of his injury, he was actually in employment and there was reasonable probability that he would continue in employment for some time. Two fatal accident cases decided during the pre-amendment era namely, *Yaakob v Sintat Rent A Car Service (M) Sdn Bhd & Anor [1983] 2 MLJ 283 and Chong Sow Ying v Official*

*Administrator* [1984] 1 MLJ 185, illustrate this point. In both cases the deceased persons were healthy sixty year old men in active employment. Damages for lost dependency were awarded in both cases. This would not be possible today. Today, in most professions men and women work beyond the age of fifty-five years and take on or incur financial commitments on their ability to work after that age. Unfortunately, the 1984 Amendment Act has removed the discretion of the judges to award damages for those who could work, or are working, after fifty-five years. An illustrative post-amendment case is *Tan bin Hairuddin v Bayeh a/l Belalat* [1990] 2 CLJ 773. In this case the plaintiff had attained the age of 59 years at the time of his injury. It was held that he was not entitled to both pre-trial and post-trial loss of earnings, even though he could prove such loss of earnings.

## The requirement of good health

The new section 28A (2)(c)(i) also provides that damages for loss of future earnings "shall not be awarded unless it is proved or admitted that the plaintiff was in good health" before the injury. This provision may be criticised for two main reasons. First, at Common Law the plaintiff's poor health before the injury may be treated only as a mere contingency which may reduce his award for loss of earnings. His poor health before the injury was not a total bar to recovery of damages for future earnings. Secondly, the new section does not define "good health", probably because it is almost impossible to do so. The courts now face a heavy burden to arrive at a just definition of good health. Fortunately to date the courts have approached this issue with marked caution.

In *Osman Effendi v Mohd Noh* [1998] 4 AMR 3687, K.N. Segara J, after referring to the requirement of good health in the new section, said that there was always a presumption that the plaintiff was in good health before the injury and that the requirement of good health before the injury was fulfilled when there was no challenge by the defendant either specifically in his pleadings or in his cross-examination of the plaintiff.

In a more recent case, *Loh Hee Thuan v Mohd Zani bin Abdullah* [2003] 1 AMR 332 there was evidence before the court that the injured plaintiff had a

history of diabetes mellitus. There was also evidence of an old infarct in the right basal ganglia of the brain. The High Court rejected counsel's argument that the plaintiff was not in good health. The learned High Court judge said,

> "On the facts, I find that there is sufficient evidence to show that the plaintiff was leading a normal life before the accident. Whilst the plaintiff's wife testified that her husband had diabetes, the medical reports and the various doctors' evidence showed that the plaintiff's diabetes was well under control. As for the old infarct, there is no reason to doubt the neurosurgeon who testified that the residual defects that the plaintiff is undergoing were not due to the old infarct but to an injury to the brain caused by the accident.
>
> I do not think that the words "proved or admitted" that the plaintiff was in good health as found in s. 28A(2)(c)(i) of the Act must mean that the plaintiff's entire personal medical records must be tendered before the court could consider to make an award for loss of future earnings.
>
> The fact that he had led a normal life up to the time of the accident and had led evidence that he was "receiving earnings by his own labour or other gainful activity before he was injured" is sufficient in my view to satisfy the requirement of proof as stated in s. 28A(2)(c)(i) of the Act."

I must add that these cases must not encourage complacency that the courts will use their powers of interpretation to shut out the inherent problems caused by this new provision. There may be a case where the claimant's medical history clearly points to what the court conceives to be poor health before the accident. In such a case it appears that the court may be compelled not to award damages for loss of future earnings, for the words of the section are that "damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury". In my opinion, the Common Law position, which treats poor health as a mere contingency and not as a total bar, is a fairer position and I would humbly but earnestly propose that the words which I earlier quoted, be repealed.

## Persons not receiving earnings

Perhaps the most severe effect of the new section 28A(2)(c)(i) is that loss of future earnings shall not be awarded unless the plaintiff was, in the words of that section, "receiving earnings by his own labour or other gainful activity before he was injured". This provision affects many categories of employable persons who are not receiving earnings at the time of the injury. Amongst those affected are persons who are temporarily out of employment, young men and women just about to enter employment, and children who would have found employment in the future. To be entitled to damages for loss of future earnings they must prove that they were earning at the time of the injury. At Common Law the fact that the victim was not earning at the time of the injury was never a bar to a claim for loss of future earnings. Indeed, awards under this head had been made in the case of very young children, although such assessment involved great difficulty and, invariably, some guesswork.

The words "was receiving earnings by his own labour or other gainful activity before he was injured" was first considered by the Supreme Court in *Dirkje v Mohd Noor* [1990] 3 MLJ 103. In that case, Dirkje, a Dutch national, was a qualified registered nurse. On November 1, 1983 she took no pay leave for a period of two and a half years to enable her to go on a world tour. She arrived in Malaysia on 21 October 1984, that is, 20 days after the 1984 Amendment Act had come into force. On 24 October 1984 while cycling towards Ipoh, she was knocked down by a bus. She suffered very severe injuries. Before the Supreme Court the crucial question was whether she was entitled to loss of future earnings as she was on no pay leave at the time she was injured.

The Supreme Court took the view that the words "before he was injured" in section 28A(2)(c)(i) meant "at the time" he was injured. The Supreme Court decided that as Dirkje was on no pay leave at the time she was injured she was not entitled to any award for loss of future earnings. A year later the Supreme Court took a similar stand in another case, *Tan Kim Chuan v Chandu Nair* [1991] 1 MLJ 42 which involved a twelve year old schoolboy. It was held that he was not entitled to damages under this head because he was not receiving earnings at the time he was injured. These two cases demonstrate the unfortunate position created for an unemployed plaintiff. Under the Common

Law, as applied by Malaysian courts before the 1984 Amendment Act came into force, the plaintiffs in both cases would have received substantial damages under the head of loss of future earnings. After the 1984 Amendment Act it is immaterial that the injured plaintiff was once receiving earnings or would certainly receive earnings within a short time, or that he was only on no pay leave for a short period at the time he was injured.

Returning again to *Dirkje's* case it was argued before the Supreme Court that she should be awarded damages under another head, loss of earning capacity. This head of general damages is different from loss of future earnings. This head arises where the injured person continues in employment but there is a risk that because of his injuries he may lose his employment some time in the future or may be compelled to retire early. It was argued in *Dirkje's* case that this head was not expressly or impliedly affected by the 1984 Amendment Act because it contained no provision on this subject. The Supreme Court appears to have accepted this argument for it held that *Dirkje* was entitled to damages for loss of earning capacity and awarded RM200,000 under this head. The decision caused some excitement. If, after the 1984 Amendment Act, a plaintiff will not be precluded from seeking damages for loss of earning capacity merely because he was unemployed or was a young person at the time of the injury, this would, to a small degree lessen the difficulties caused by the new section 28A(2)(c)(i).

The excitement caused by *Dirkje's* case came to a quick end a year later as a result of a subsequent decision of the Supreme Court, namely *Tan Kim Chuan v Chandu Nair* [1991] 1 MLJ 42. In that case the injured appellant was a twelve year old schoolboy who was not earning at the time he was injured. A crucial question was raised, namely, whether he was entitled, following *Dirkje's* case, for loss of earning capacity in consequence of his injuries. Abdul Hamid, L.P who delivered the judgment of the Supreme Court, dealt with the argument for the appellant that the 1984 Amendment Act did not intend to deprive the appellant of damages for loss of earning capacity. His Lordship stated the Supreme Court's view that such an interpretation was not supported at all by the language of section 28A. It was reiterated that section 28A(2)(c)(ii) which states that "only the amount relating to his earnings as aforesaid at the time when he was injured and the Court shall not take into

account any prospect of the earnings as aforesaid being increased at some time in the future," made the intention of the legislature abundantly clear. His Lordship was of the view that the legislature had the prospect of future earnings (whatever the label attached to it) in mind when the 1984 Amendment Act was enacted. His Lordship felt that the legislature had decided exhaustively and exclusively that an injured person ought not to get damages in a claim either for loss of future earnings or loss of earning capacity unless at the date of the accident he was in fact receiving earnings.

In his Lordship's view *Dirkje's* case could be distinguished from the case before the court because in *Dirkje's* case there was evidence that the plaintiff was earning RM1,270 per month before she came to this country and was injured. His Lordship was of the view that there was evidence in that case to show that the plaintiff had suffered a loss of earning capacity.

In my view, this is an area where the law is in need of reform. The present age has been declared to be the age of a caring society. The denial of damages under both heads, namely, loss of future earnings and loss of earning capacity, to children and persons who are unemployed, raises serious social security and welfare questions, particularly where the injured persons suffer paralysis or severe disability.

## Prospective increase to be ignored

I now move to another matter.

At Common Law the court could in assessing future loss of earnings, take into account the prospect that, had the plaintiff not been injured, his earnings would have increased in the future, e.g. by promotion in his job. In *Nordin v Mohamed Salleh* [1986] 2 MLJ 294, a pre-Amendment Act case, the prospect of the injured plaintiff, who was a Lance-Corporal at the time of the injury, rising to a rank of Sergeant was taken into account by the Supreme Court. The 1984 Amendment Act has removed such discretion by providing that "the Court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future". The most striking example of the

application of this new provision is *Marappan v Siti Rahmah* [1990] 1 MLJ 99. This case involved a twenty-three year old trainee teacher whose injuries in 1986 resulted in complete paralysis in her four limbs. At the time of her injury she was receiving RM345 as a training allowance. At Common Law the prospect that she would have completed her training and would have received a trained teacher's pay would have been taken into account. But since the accident occurred after the 1984 Amendment Act had come into force the prospect of her earnings being increased as a future trained teacher was ignored. Fortunately the training allowance of RM345 was taken as earnings and that figure was used as the multiplicand for the computation of loss of future earnings.

## Living expenses to be deducted

The 1984 Amendment Act added another provision to the Civil Law Act 1956, namely, section 28A(2)(c)(iii), which provides that the court in awarding damages for loss of future earnings shall deduct "such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured". What was the intention of Parliament in enacting this provision? Was it to exclude all living expenses which is proved or admitted? This certainly cannot be the intention of Parliament. A living plaintiff would continue to incur "living expenses" in its literal sense.

In 1992 the Supreme Court considered for the first time the issue of deduction of living expenses in *Chang Chong Foo v Shivanathan* [1992] 2 MLJ 473. In this case, before the trial judge the plaintiff had given evidence that he was a daily rated worker and that from his income he spent RM60 a month on petrol for his motor-cycle and RM5 per day for meals at his place of work. The aforesaid expenses for petrol and meals were not deducted by the trial judge in determining the damages for loss of future earnings.

On appeal the Supreme Court held that the claimant's petrol and meal expenses should be deducted. This aspect of the Supreme Court's decision can be accepted as the disabled claimant would no longer incur those expenses and secondly those expenses were directly connected to earning his living. But

certain passages in the judgment of the Supreme Court indicate a broader principle. The Supreme Court was of the view that section 28A(2)(c)(iii) was "clearly intended" to apply to a living plaintiff and that it applied to the facts of the case. It was also of the view that the words "living expenses" in that section must be given their ordinary meaning. The Court referred to section 7(3)(iv)(c) which deals with dependency claims arising from fatal accidents. It provides for a deduction of the living expenses of a deceased in computing the multiplicand in a dependency claim. Harun Hashim SCJ, who delivered the judgment of the Supreme Court, said,

> "It will be seen that the same language is used in both section 7(3)(iv)(c) and section 28A(2)(c)(iii). It follows that the legislature intended that the same principle be applied in both cases, that is to say, in respect of a dependency claim for loss of earnings arising out of a fatal accident and in respect of a claim for loss of future earnings for personal injury. We are accordingly of the view that the term `living expenses' in section 7 and section 28A bear the same meaning."

With great respect, the practice of deducting the living expenses of a deceased person in a dependency claim is based on the fact that, that element did not go towards supporting his dependants and therefore should not be used to determine his dependant's lost support. In a personal injury claim the claimant continues to live and incur living expenses. A fairer approach is found in another case, *Tey Chan & Anor v South East Asia Insurance Bhd* [1993] 3 MLJ 760. In this case the learned High Court judge, Richard Tallala J, said,

> "As to loss of earnings, the view I take is that the living expenses to be deducted under s. 28A(2)(c) of the Civil Law Act 1956 are not the whole of the first plaintiff's expenses of living but the expenses reasonably incurred by him in earning his living, such as the extra cost of having his meals and refreshment while at work, which cost would not ordinarily have been incurred had he stayed at home. To hold otherwise and deduct the whole of the living expenses will, to my mind, give a meaning to the words `living expenses' in the said section which can lead to absurd and unjust consequences and which, it would seem, could not have been what Parliament had in mind when it enacted the legislation."

It is hoped that our courts will adopt the liberal approach suggested by *Tey Chan's* case. My proposal is that this provision dealing with living expenses should be repealed.

## Multipliers in personal injury cases

The 1984 Amendment Act also dealt with the computation of the multiplier or "the years of purchase" for the assessment of loss of future earnings of an injured person. Before the Amendment Act the common practice was to determine the multiplier by first taking the age of fifty-five years as the age when earnings would cease, then deducting the age of the victim at the date of trial from this figure of fifty-five and reducing the balance obtained by one-third for contingencies. As a result of the Amendment Act a new section 28A(2)(d) altered the position by providing fixed multipliers. For example, section 28A(2)(d)(i) provides that for a person of the age of thirty years or below "at the time when he was injured the number of years of purchase shall be 16". A random comparison between multipliers calculated under the old practice and the fixed multipliers created by the new section show that the legislature had in fact reduced the multipliers previously applied by our courts. A simple arithmetical exercise will show that for a person of age 25 years the multiplier calculated under the old practice has been reduced by about four years. It is clear that Parliament had taken into account contingencies and other factors when it provided for fixed multipliers in the new section. These facts prompt an important question. After the 1984 Amendment Act is it still necessary to take into account contingencies, vicissitudes of life and accelerated payment when calculating the multiplier for the award for loss of future earnings? This question has become relevant after the Court of Appeal's decision in *Takong Tabari v Govt of Sarawak* [1998] 4 MLJ 512, a fatal accident case.

In *Takong Tabari* the Court of Appeal, relying on another fatal accident case, Chan Chin Ming v Lim Yok Eng [1994] 3 MLJ 233, upheld a trial judge's decision to reduce the total award for loss of support under section 7 of the Civil Law Act 1956 by one-third for contingencies, other vicissitudes of life and accelerated payment. The Court of Appeal rejected the argument that the multipliers introduced by the 1984 Amendment Act had a built-in reduction

and therefore had already taken into account contingencies and other factors. *Takong Tabari* was a claim for dependency under section 7 of the Civil Law Act 1956. It was not a claim for damages by a living plaintiff. Unfortunately, the decision has been used by defendants in personal injury claims to argue that a similar one-third reduction should be made to awards for loss of future earnings for living persons. The argument has been received favourably in some High Court cases. The unreported case, *Teah Cheng Gow v Elias bin Abdul Ghani* (Civil Appeal No. R2-12-118 of 1997), is one such decision. Some High Court cases have avoided applying the one-third reduction in personal injury claims. *Loh Hee Thuan v Mohd Zaini* [2003] 1 MLJ 213 and *Kanan a/l Subramaniam lwn Aman Syah* [2002] 6 CLJ 34 are two examples. To my knowledge, until today, there is no clear ruling by the Court of Appeal on this matter.* **(See note below)**.

It is my hope that *Takong Tabari* will not be applied to a personal injury case. As I had submitted the fixed multipliers stated in section 28A(2)(d) have already provided for more than an adequate reduction. A further reduction of the award for loss of future earnings cannot, in my view, be supported.

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***Note (based on materials available to me in early April 2004).**

After this lecture was delivered, the Court of Appeal's decisions in two civil appeals, *Ibrahim bin Ismail & Anor v Hasnah bte Puteh & Anor* (Civil Appeal No A-04-15-1999) and *Lai Wai Keet & Anor v Looi Kwai Fong* (Civil Appeal No A-04-27-1999), were reported together in one judgment. (See [2004] 2 AMR 253 (Week 12, March 24, 2004) and [2004] 2 CLJ 797 (March, 2004 Part 3)). In this unanimous judgment the Court of Appeal approved the strong dissenting judgment of Edgar Joseph Jr. SCJ in the Supreme Court case of *Chan Chin Ming v Lim Yok Eng* [1994] 3 MLJ 233. In that case his Lordship had stressed that Parliament in enacting the statutory multipliers had intended to take away the discretion of the court. In the instant appeals the Court of Appeal referred to the imperative language of the provisions which contained the statutory multipliers. The Court of Appeal was of the view that the majority in Chan Chin Ming failed to apply the appropriate guide to statutory interpretation and hence fell into error. With reference to *Takong Tabari*, Gopal Sri Ram JCA, who delivered the judgment of the Court of Appeal, said,

"Our attention was drawn to *Takong Tabari v Government of Sarawak & Ors* [1998] 4 CLJ 589 where this court applied the majority judgment in *Chan Chin Ming*. A careful reading of the judgment in the *Takong Tabari* case makes it clear that no arguments as to the correctness of the decision in *Chan Chin Ming* was ever addressed to this court. That is not the case here. In the instant appeals counsel before us mounted a frontal attack on the correctness of the majority judgment in *Chan Chin Ming*. We therefore merely happen to be more fortunate than the court in Takong Tabari to deal with the assault on *Chan Chin Ming*."

The Court of Appeal then dealt with each of the instant appeals. It is the second appeal, *Lai Wai Keet & Anor v Looi Kwai Fong* which is relevant here. It concerned a personal injury claim. In this case, the trial court, the Sessions Court, had made an award for loss of future earnings for the plaintiff by applying the statutory multiplier set out in section 28A(2)(d)(i). On appeal, the High Court reduced the multiplier by one-third, relying on *Chan Chin Ming* and *Takong Tabari*. The plaintiff appealed to the Court of Appeal. The Court of Appeal upheld the appeal saying that it was wrong for the High Court to have made a further deduction from the "imperative figure".

For the time being, the Court of Appeal appears to have settled the controversy whether *Takong Tabari* should be applied in personal injury claims. Incidently it is pertinent to note that by virtue of section 96 of the Courts of Judicature Act 1964 there is no right of appeal to the Federal Court against Ibrahim bin Ismail's case and *Lai Wai Keet's* case because both cases originated in the Sessions Court.

## Fatal Accidents

I now come to the subject of fatal accidents.

Malaysian law on the damages that may be claimed for causing wrongful death is found in section 7 and section 8 of the Civil Law Act 1956. Today, of the two claims arising from wrongful death, namely the estate claim and the

dependency claim, the more important claim is the dependency claim. I intend to focus my attention on the dependency claim this afternoon. The dependency claim is a claim under section 7(1) of the Act for lost support brought by the dependants of a deceased person.

## Meaning of dependants

By virtue of sections 7(2) and 7(11) of the Civil Law Act 1956, the persons entitled to bring a claim for lost support are a deceased's spouse, parents, children, step-children, grandchildren and grandparents. It will be noted that the class is restrictive. It does not include brothers and sisters and collateral relatives, like uncles and aunts. In this context the Malaysian provisions are outdated and unrealistic. For instance, the exclusion of brothers and sisters as dependants does not reflect Malaysian and Asian realities, Asian family ties and family life. In *Chan Chin Ming v Lim Yok Eng* [1994] 3 MLJ 233 the Supreme Court held that money spent on the brothers and sisters of a deceased provider could not be claimed as lost support because they were not dependants within the meaning of the Act.

## Meaning of "loss of support"

Under section 7(1) the claim which a dependant may bring is "for any loss of support suffered together with any reasonable expenses incurred". In *Chan Chin Ming v Lim Yok Eng* [1994] 3 MLJ 233, a case which has influenced many a subsequent decision, the Supreme Court gave a restrictive interpretation to the meaning of the expression "loss of support".

In that case the plaintiff brought a claim under section 7(1) in respect of the death of her unmarried son. The learned trial judge assessed the plaintiff's monthly loss of support resulting from her son's death as RM750. Before the learned trial judge the plaintiff admitted that she spent only half of the said RM750, namely RM375, on herself. She gave evidence that she spent the other half on her other three school-going children. The defendant argued before the trial judge that the plaintiff's actual loss of dependency was RM375

and not RM750, as her three children were not the dependants of the deceased under section 7(2). The trial judge rejected this argument.

The trial judge noted that section 7(3) of the Act which originally provided that "the Court may give such damages as it thinks fit" to a dependant was substituted with a new provision by the 1984 Amendment Act. The substituted provision provides that the damages payable shall be such as will compensate the claimant for "any loss of support suffered." His Lordship felt that the word `support' should not be restricted to food or sustenance for the mother. `Support' should be equated with the pecuniary benefit the plaintiff received from her son so as to enable her to lead a certain life-style. The deceased son had provided her with funds not only to maintain herself but also to discharge her duties as a widowed mother and guardian of her minor children.

His Lordship said,

> "What she chose to do with the money her son gave her should not be the concern of the defendant tortfeasors. The measure of damages is the pecuniary loss suffered by the plaintiff as a result of the death of her son. The pecuniary loss is the actual benefit of which the plaintiff has in fact been deprived."

The defendant appealed to the Supreme Court.

Peh Swee Chin SCJ, who delivered the judgment of the Court, held that the trial judge's award of RM750 per month should be reduced to RM375 per month. His Lordship felt that the new expression, `loss of support', had not added anything new to the state of the law. His Lordship held that under section 7(2) the three siblings of the deceased were not entitled to claim for loss of support. He said that in the instant case, only the mother was entitled to make a claim. His Lordship said that loss of support must be translated into financial loss sustained by a dependant and that a dependant can only claim "for financial loss which he sustains as a dependant and not in any other way".

With respect, it is difficult to support this restricted interpretation of the Supreme Court. At Common Law, where a deceased had made a money

payment to a dependant, there is no authority which provides that the dependant must show that he actually needed that contribution for his livelihood or for his food and sustenance. Similarly, there appears to be no decision that requires him to show that he needed the whole of the contribution for his livelihood. I would humbly submit that once the claimant had clearly proved that the deceased had provided a certain sum of money for him or her, the court should not concern itself with what the claimant did with the money. For these reasons the views expressed by the trial judge are preferred to those of the Supreme Court. A learned judge, Jeffrey Tan JC, in another case, *Muhamad bin Hashim v Teow Teik Chai* [1996] 1 CLJ 615, pointed out that there is a need to give the words in section 7(3) its natural meaning. A requirement that a claimant must be dependent on the support from a deceased will not give a natural meaning to the plain and ordinary words in section 7(3).

## Multipliers

The assessment of a dependant's damages under a dependency claim involves the determination of a "multiplicand" and a "multiplier". The multiplicand is the monthly or annual loss either in the form of lost money support and/or in the form of lost services which were provided by the deceased during his or her life-time. The multiplier or "the years of purchase" is the number of years during which the deceased would have supported the dependant.

At Common Law, the determination of the appropriate multiplier depended, as a starting point, on the deceased's age and the probable length of his working life. It was a common practice of the Malaysian courts to fix the retirement age of the deceased as 55 years. The multiplier was determined by deducting the deceased's age from the retirement age and scaling down the difference by a further one-third for normal contingencies and other factors. It was possible for the court to deduct more than one-third where special circumstances warranted a higher deduction, for example, where the deceased was in poor health before the accident which caused his death. Again, where there was a likelihood that the deceased, had he lived, would have ceased his support for the claimant after a number of years, the multiplier may be reduced considerably. Thus, at Common Law, where the deceased was a bachelor,

whose marriage was on the cards, his parents were not entitled to the full multiplier, for he may cease his support after his marriage.

The 1984 Amendment Act replaced the old practice by providing fixed multipliers or "years of purchase" for dependency claims in a new section 7(3)(iv)(d). For example, section 7(3)(iv)(d)(i) provides that for a deceased aged 30 years or below "the number of years of purchase shall be 16". The new section ignores the Common Law rule that in a dependency claim, the age of the dependant or claimant and the marital status of the deceased is important. Taken by itself the new provision would give a dependant mother of 75 years claiming in respect of the death of a 29 year old son, a multiplier of 16 years. Had Parliament taken away the discretion of the court to select an appropriate multiplier in special cases, for example, in a claim by a mother of advanced years in respect of the death of her bachelor son?

In *Chan Chin Ming v Lim Yok Eng* [1994] 3 MLJ 233, Peh Swee Chin SCJ, who delivered the majority judgment of the Supreme Court, referred to pre-amendment cases on the subject and held that the new provision had not altered all aspects of the Common Law position. His Lordship held that a mother of a 25 year old deceased bachelor was only entitled to a multiplier of seven years and not the 16 years as mentioned in the new provision. Edgar Joseph Jr. SCJ, delivered a powerful dissenting judgment. Referring to the proposition that the court had the discretion to select a suitable multiplier his Lordship said,

> "This proposition is, in my view, quite untenable, and has only to be stated to be rejected, bearing in mind that when a question of statutory interpretation arises, the duty of the court is simply to give effect to the will of Parliament as expressed in the law."

The aftermath of the stand taken by the majority in that case, namely that, despite the plain words of the new provision, the courts may resort to the Common Law, must now be explored.

### *Takong Tabari*

Reference must now be made to the Court of Appeal's decision in *Takong Tabari v Govt of Sarawak & Ors* [1998] 4 MLJ 512. The deceased in this case was killed in an explosion in Miri, Sarawak. The deceased's widow brought an action against the alleged tortfeasors claiming damages for loss of support for herself and other dependants. In the High Court, the learned trial judge assessed the multiplicand for the claim as RM2500 per month. Since the deceased was 37 years old at the time of his death the learned judge determined the multiplier to be 9 years based on the formula provided in the new provision. After having determined the multiplier as 9 years and the multiplicand as RM2500 per month, his Lordship said,

> "Therefore the total general damages for loss of dependency should be: RM2,500 x 12 x 9 = RM270,000.
>
> However, I should deduct for contingencies, other vicissitudes of life and accelerated payment, a sum equivalent to one-third thereof, thereby leaving the balance payable in the sum of RM180,000."

This was the first reported case after the coming into force of the 1984 Amendment Act, in which a deduction was made for contingencies and other factors from the total award for lost support. It is necessary to state that the deduction for contingencies was made from the total award and not from the multiplier. The widow appealed to the Court of Appeal against the deduction. It was contended that the one-third deduction was contrary to law because the fixed statutory multipliers came with a built-in reduction. The Court of Appeal, relying on *Chan Chin Ming v Lim Yok Eng* [1994] 3 MLJ 233, held that the learned trial judge had not erred in making the deduction.

It is respectfully submitted that there was merit in the argument that the statutory multipliers introduced by the 1984 Amendment Act contain a "built-in reduction." A comparison of multipliers computed under the pre-amendment practice and the post-amendment law, based on randomly chosen ages would indicate this reduction. For example, today, by virtue of section 7(3)(iv)(d)(ii), the multiplier prescribed for a 35 year old deceased is 10 years. When compared to the pre-amendment practice, this shows a reduction of about 3

years. The pre-amendment practice of making a reduction for contingencies and other factors should no longer be applicable. It is respectfully submitted that *Chan Chin Ming* cannot be used to support an argument for a general reduction of one-third in all cases. In *Chan's* case, the reduction of the statutory multiplier may be justified because the legislature had provided fixed multipliers for dependency claims based on the age of the deceased, without taking into account the age of the claimant and the marital status of the deceased. *Chan's* case may be supported on the ground that it would not be proper to apply the statutory multiplier of 16 years in section 7(3)(iv)(d)(i) to a claim by a mother of advanced age.

The Court of Appeal's decision in Takong Tabari, an unforeseen aftermath of *Chan Chin Ming,* will be a setback for claimants for dependency under the Civil Law Act 1956. Some High Court cases have taken *Takong Tabari* as deciding that as a matter of law all total sums awarded for lost dependency must be reduced by one-third to provide for contingencies and other factors. *Rohani bte Said v Noraini bte Omar* [2002] 2 MLJ 725 is an example. I would respectfully submit that the Court of Appeal's decision in Takong Tabari merely upheld the exercise of the trial judge's discretion based on the facts in that case to reduce the award for contingencies and other factors. It is my view that despite Takong Tabari, it is still open to a trial court not to make a deduction where it feels that such a deduction is not warranted. A recent High Court case that supports this view is *Muniyandi & Anor v Eric Chew Wai Keat & Anor* [2003] 3 MLJ 527.

In another recent High Court case, *Latif bin Che Ngah v Maimunah bte Zakaria* [2002] 4 MLJ 266, Nik Hashim J made a careful analysis of a significant passage in *Chan Chin Ming* and said,

> "Thus it is clear from the above passage that the whole decision in Chan Chin Ming relates to a claim by a parent. A claim by a spouse and children is not affected by the decision."

In my opinion, these lines from the judgment of the learned judge aptly summarises the effect of *Chan Chin Ming*. That case, which dealt with a claim by a mother of a deceased unmarried son, should not apply to a claim, as in *Takong Tabari*, by a widow and the children of a deceased person.

It is hoped that Takong Tabari will be overruled when the opportunity arises.* [**See note below**]. The ideal solution would be for the relevant authorities to review section 7(3)(iv)(d) and enact a new provision that restates the position at Common Law.

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***Note (based on materials available to me in early April 2004).**

After this lecture was delivered, the Court of Appeal's decisions in two civil appeals, *Ibrahim bin Ismail & Anor v Hasnah bte Puteh & Anor* (Civil Appeal No A-04-15-1999) and *Lai Wai Keet & Anor v Looi Kwai Fong* (Civil Appeal No A-04-27-1999) were reported together in one judgment. (See [2004] 2 AMR 253 (Week 12, March 24, 2004) and [2004] 2 CLJ 797 (March 2004, Part 3)). In an unanimous judgment the Court of Appeal approved the "powerful dissent" of Edgar Joseph Jr. SCJ in *Chan Chin Ming*, referred to above. The Court of Appeal came to a conclusion that Chan Chin Ming was wrongly decided. Referring to *Takong Tabari*, Gopal Sri Ram JCA, who delivered the judgment of the Court of Appeal, said,

> "A careful reading of the judgment in the Takong Tabari case makes it clear that no arguments as to the correctness of the decision in *Chan Chin Ming* was ever addressed to this court."

The Court of Appeal then turned to address each of the two instant appeals. It is the first appeal, *Ibrahim bin Ismail & Anor v Hasnah bte Puteh*, which involved a claim under section 7 of the Civil Law Act 1956, which is relevant here. In this case, the trial court, the Sessions Court, had applied the statutory multiplier of 16 years as stated in section 7(3)(iv)(d)(i). On the defendant's appeal to the High Court, the learned High Court judge reduced the multiplier. Before the Court of Appeal the claimant sought to restore the trial court's award of the statutory multiplier. The Court of Appeal decided in favour of the claimant, holding that there was no duty on the High Court judge to reduce the multiplier.

The impact of *Ibrahim bin Ismail & Anor v Hasnah bte Puteh & Anor* remains to be seen. As indicated in the earlier Note, both *Ibrahim bin Ismail's* case and *Lai Wai Keet's* case originated in the Sessions Court. There is therefore no right of appeal to the Federal Court.

## Deceased had attained the age of fifty-five years

I must now move on to another matter, namely, the fourth proviso to section 7(3). The first part of the fourth proviso deals with a deceased who had attained the age of fifty-five years at the time of his death. It provides that his loss of earnings after his death shall not be taken into account in a dependency claim brought as a result of his death. This may be a setback for a dependent widow or the dependent children of a deceased who had attained the age of fifty-five years. This new provision is another alteration of the position at Common Law. Before the Amendment Act it was the normal practice of our courts to take fifty-five years as the retirement age but this was a flexible rule. I have already referred to two dependency claims decided in the pre-amendment era which illustrate the Common Law position. They involved healthy sixty year old men in active employment at the time of their death. The court exercised its discretion and made an award for loss of support even though the deceased had attained the age of fifty-five years. This discretion has now been taken away by the 1984 Amendment Act. This is a matter which requires reconsideration.

## In good health and receiving earnings

The first part of the fourth proviso to section 7(3) also deals with two other matters. These matters involve a deceased who had not attained the age of fifty-five years. The proviso states that the deceased's loss of earnings shall be taken into consideration if it is proved or admitted that he was in good health and was receiving earnings by his own labour or other gainful activity prior to his death. I had pointed out earlier in this lecture to similar requirements in section 28A regarding an injured person's claim for loss of future earnings. With regard to good health nothing more needs to be said than to repeat my opinion that a strict application of the requirement may lead to unfair results and that it should be repealed.

The second requirement that the deceased must be receiving earnings by his own labour or other gainful activity is also a departure from well-established Common Law principles. When a person nearing working life dies, there may be persons, like parents, who may suffer loss in the form of future support that

they had expected from the deceased. At Common Law there is no general bar against a dependency claim brought by the parents of a deceased who had not started to earn at the time of his death. A parent can succeed if he or she can prove reasonable probability of future loss of support from the deceased. Whilst the Common Law has shown reluctance to recognise future support from young children, it has displayed a readiness to do so if the deceased person was nearing adulthood or nearing employment.

A pre-amendment Malaysian case which adopted this Common Law approach is *Chiang Boon Fatt v Lembaga Kemajuan Negeri Pahang* [1983] 1 MLJ 89. The deceased in this case was killed in an accident which occurred on 26th May 1975. He died just two days before he was due to register at the University of Malaya as a direct second year student. George J considered the probabilities as to what would have happened if the accident had not occurred. His Lordship was of the view that the deceased would in all probability have registered with the University and completed his course. He would then have pursued a career that would have enabled him to support his parents. George J assessed the parent's lost support as RM200 per month and the lost period of support as seven years. Today, a claim for prospective lost support by parents, as in *Chiang Boon Fatt*, would not be possible. The 1984 Amendment Act has altered this pre-amendment law by providing that the deceased must be earning at the time of his death. Also, in this context, it is pertinent to point out that a claim for bereavement under section 7(3A) by the parents of a deceased child is only possible where the child "was a minor and never married".

## Conclusion

It is now almost twenty years since the Civil Law (Amendment) Act 1984 came into force. After almost twenty years it is appropriate that the new provisions introduced in 1984 be reviewed with a view to reform. In attempting a review I admit that one must not place too much emphasis on the rhetoric of the Common Law and the trends in wealthy nations. I admit that one must look carefully and closely at the realities in Malaysia, its economy and the welfare of its industries, particularly the insurance industry. On the other hand, I must emphasise that, heed must be given to the cry that the law must be amenable to the needs of a caring society. These various factors deserve equal attention and balancing them is no easy task. Although the task will be difficult, it is hoped that a thorough review of the existing law in Malaysia on the subject of damages for personal injuries and causing death will be undertaken as soon as possible.